

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	Docket No. CWA-08-2017-0026
Kent Hoggan, Frostwood 6 LLC, and)	
David Jacobsen,)	
)	
Respondents.)	

COMPLAINANT’S MOTION FOR ACCELERATED DECISION ON LIABILITY

Complainant, files this Motion for Accelerated Decision on Liability (“Motion”) pursuant to 40 C.F.R. § 22.20(a). Complainant seeks an accelerated decision on liability as to Respondents Kent Hoggan and Frostwood 6 LLC (together, “Respondents”) on a subset of the allegations of violation in the Complaint. Complainant does not seek an accelerated decision on any other allegations of violation in the Complaint, against David Jacobsen, or on the appropriate penalty.

Complainant seeks an accelerated decision that:

(A) Respondents violated Clean Water Act (“CWA”) § 301 by discharging pollutants from a point source to waters of the U.S. without a permit between November 19, 2016, and April 26, 2017. *See* Section IV.A of the attached Memorandum in Support.

(B) Kent Hoggan violated terms and conditions of a CWA discharge permit between November 18, 2015, and November 18, 2016, and Frostwood 6 LLC violated terms and conditions of a CWA discharge permit between April 27, 2017 and the present, *as specifically detailed* in Section IV.B of the attached Memorandum in Support.

Complainant submits this Motion because no genuine issues of material fact exist regarding these allegations and Complainant is entitled to judgment as a matter of law.

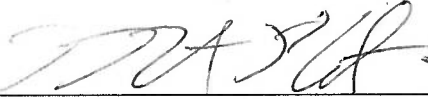
Complainant attached a Memorandum in Support to this Motion.

An attorney for Complainant spoke with Respondents' attorney, who confirmed that Respondents oppose this motion.

Respectfully submitted,

Date: March 1, 2019

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Docket No. CWA-08-2017-0026

**MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR
ACCELERATED DECISION ON LIABILITY**

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I. INTRODUCTION

This Memorandum is in support of a Motion for Accelerated Decision on Liability (“Motion”) brought by Complainant and is filed simultaneously with the Motion.

Complainant filed the Complaint initiating this matter on September 27, 2017, and named four Respondents: Kent Hoggan; Frostwood 6 LLC; David Jacobsen; and CBM Leasing, LLC. OALJ Document Index # 1. Complainant subsequently filed a Partial Motion for Withdrawal of Complaint Against CBM Leasing, LLC, which the Presiding Officer granted. OALJ Document Index ## 7, 10. Complainant and Mr. Jacobsen reached a settlement that is routing for signature and will fully resolve the claims against him. The remaining Respondents in this Clean Water Act (“CWA”) case are Frostwood 6 LLC and Mr. Hoggan (together, “Respondents”).

Complainant seeks an accelerated decision on liability for a subset of the allegations in the Complaint, as no genuine issues of material fact exist and Complainant is entitled to judgment as a matter of law on those allegations. At this time, Complainant does not seek an accelerated decision on any other allegations of violation or on the appropriate penalty.

Complainant seeks an accelerated decision that:

- (A) Respondents violated CWA § 301 by discharging pollutants from a point source to waters of the U.S. without a permit between November 19, 2016, and April 26, 2017. *See* Section IV.A.
- (B) Kent Hoggan violated terms and conditions of a CWA discharge permit between November 18, 2015, and November 18, 2016, and Frostwood 6 LLC violated terms and conditions of a CWA discharge permit between April 27, 2017 and the present, *as detailed* in Section IV.B.

The elements of these violations, as well as the applicable permit terms and conditions, are the largely same for Respondents. Accordingly, this Memorandum discusses them together and notes when an allegation of violation applies only to one Respondent.

II. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Federal Water Pollution Control Amendments of 1972, commonly referred to as the CWA, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Among other things, the CWA prohibits any person from discharging a pollutant from a point source into navigable waters without a permit. 33 U.S.C. § 1311(a). CWA § 402 authorizes the EPA and any state with an EPA-approved National Pollutant Discharge Elimination System (NPDES) program to issue NPDES permits. 33 U.S.C. § 1342.

In 1987, Congress added CWA § 402(p), specifically addressing discharges of municipal and industrial storm water. *See* Section 405 of Pub. L. No. 100-4, 101 Stat. 7 (Feb. 4, 1987) (codified as 33 U.S.C. § 1342(p)). EPA promulgated regulations implementing CWA § 402(p)’s permit requirements for storm water discharges in two phases: Phase I in 1990, 55 Fed. Reg. 47990 (Nov. 16, 1990) codified at 40 C.F.R. parts 122-124, CX 77, and Phase II in 1999, 64 Fed. Reg. 68722 (Dec. 8, 1999) codified at 40 C.F.R. parts 9 and 122-124, CX 3.

The Phase II regulations set forth the requirements for storm water discharges from small construction activity. 40 C.F.R. § 122.26(a)(9)(i)(B). Small construction activity is defined as clearing, grading, and excavating that results in land disturbance of equal to or greater than one acre and less than five acres. 40 C.F.R. § 122.26(b)(15). A discharger of storm water associated with small construction activity must apply for an individual permit or seek coverage under a storm water general permit issued by the EPA or a state with an EPA-approved NPDES program. 33 U.S.C. §§ 1311(a) and 1342(p); 40 C.F.R. § 122.26(c)(1). A permittee must comply with a permit’s terms, 40 C.F.R. § 122.41, and the United States may enforce a state-issued NPDES permit. 33 U.S.C. §§ 1319 and 1342(i).

EPA approved the Utah Department of Environmental Quality Division of Water Quality (DWQ) to administer the NPDES program on July 7, 1987. CX 76. Effective July 1, 2014, DWQ issued a Utah Pollutant Discharge Elimination System (UPDES) General Permit for Discharges from Construction Activities, UPDES Permit No. UTRC00000 (“Permit”), which authorizes discharges of storm water associated with construction activities including small construction activity, if as a permittee, the discharger complies with the Permit’s terms and conditions. CX 11.

Dischargers may apply for authorization to discharge under the Permit by submitting a Notice of Intent (NOI) and paying a permit fee. CX 11 at 8-9. DWQ generates a unique, site-specific UPDES Permit Tracking Number for each NOI upon authorization to discharge storm water from the designated site under the Permit’s conditions. CX 11 at 9. If an owner listed on an NOI transfers ownership of the site covered by the NOI, the Permit explains the listed owner and the new owner “are required to submit an Ownership Transfer Form . . . to DWQ (and the Municipal Separate Storm Sewer System (MS4) if [applicable]).” CX 11 at 53-54.

III. FACTS

This case concerns activity at a construction site (“Site”) and associated storm water discharges. The Site is approximately 4.76 acres in size. Answer ¶ 37.¹ Respondents constructed a housing development at the Site known as “Frostwood F6 Townhomes” at 4285 Cooper Lane, Park City, Utah. CX 15 at 1, 3, Answer ¶ 31 (respecting Frostwood 6 LLC only). Respondents engaged in construction activities that resulted in the disturbance of at least one acre. Answer ¶

¹ Citations to the Answer indicate that Respondents admitted an allegation or stated it calls for a legal conclusion, but nonetheless admitted it. Admissions apply to both Respondents, unless otherwise noted.

63 (respecting Frostwood 6 LLC only); CX 15 at 1, 3. Construction activities began on approximately January 7, 2016. Answer ¶ 38.

Mr. Hoggan is an individual who resides in Utah. Answer ¶ 28. He owns Frostwood 6 LLC, Answer ¶ 31, a corporation incorporated in the State of Utah. Answer ¶ 30.

When construction commenced, Mr. Hoggan owned the Site. CX 15 at 1. There is no evidence in the record that Mr. Hoggan submitted an Ownership Transfer Form to DWQ or sold any portion of the Site before the April 27, 2017 NOI, which listed Frostwood 6 LLC as an owner. *See* CX 29. Frostwood 6 LLC was an owner of the Site, Answer ¶ 35, from at least October 2016 onward, *see, e.g.*, CX 19 at 1; CX 21 at 1; CX 28 at 1; CX 29 at 1, 3.

On November 18, 2015, Mr. Hoggan and CBM Leasing, LLC submitted an NOI to DWQ to obtain coverage under the Permit for the Site's storm water discharges. CX 15. The permittees designated on the NOI included Mr. Hoggan as the owner and CBM Leasing, LLC as the operator of the Site. CX 15. DWQ authorized the Site's coverage under the Permit, assigning Site-specific UPDES Permit Tracking No. UTR373147. CX 15. Site coverage under the Permit expired on November 18, 2016. CX 15 at 1-2; CX 11 at 9.

On August 31, 2016, EPA inspectors² conducted an inspection of the Site to determine compliance with the Permit. Answer ¶ 49. Mr. Jacobsen identified himself to the inspectors as the operator at the Site. Answer ¶ 49.

At the time of the inspection, the EPA inspectors identified the following:

- No Stormwater Pollution Prevention Plan (SWPPP) or SWPPP map was available onsite (nor was either document provided to inspectors after the inspection). CX 18 at 1-2, 12.

² Complainant notes that two EPA inspectors participated in the August 31, 2016 inspection, while only one EPA inspector participated in the August 9-10, 2018 inspection.

- It was unknown if the NOI had been certified (signed) by the owner and operator, as the signature page was not displayed in the NOI available onsite. CX 18 at 1-2.
- The NOI listed CBM Leasing, LLC as the operator, but Mr. Jacobsen identified himself to inspectors as the operator. CX 15 at 1.
- Self-conducted storm water inspections and corrective actions were not being documented at the Site.³ CX 18 at 3-4.
- Mr. Jacobsen identified himself as the person responsible for installing and maintaining Best Management Practices (“BMPs”) and conducting storm water inspections at the Site, but indicated he had not received any formal training or certification. CX 18 at 4-5.
- Uncontained concrete washout had occurred in the southern area of the Site. CX 18 at 42.
- A disturbed area at final grade along the northern Site boundary was unstabilized. CX 18 at 38. Mr. Jacobsen indicated this area had remained unstabilized for approximately 14 days and no additional stabilization was planned for approximately 50 days following the inspection. CX 18 at 7.
- Storm water and sediment controls were not installed along some perimeter areas downgradient of disturbed soils. CX 18 at 7-8, 38-40, 43.
- Storm water and sediment controls which were installed, including straw wattles (also known as “fiber rolls”) and silt fence, needed maintenance or replacement. CX 18 at 7-8, 38-40, 43.
- Adequate storm water and sediment controls had not been installed prior to upgradient earth disturbance, and Mr. Jacobsen indicated straw bales and silt fence in the downgradient, northeastern⁴ corner of the Site were installed in response to complaints of sediment deposition onto Cooper Lane during snowmelt events in Spring 2016. CX 18 at 8, 39.

These observations and associated requested corrective actions were detailed in an Inspection Report Complainant sent to Respondents and Mr. Jacobsen on September 28, 2016. CX 18. On October 8, 2016, in response to one of the findings identified in the EPA’s September

³ Respondents have stipulated that the inspection reports and corrective action logs prepared by Mr. Jacobsen and included throughout RX 1 through RX 7 were not prepared contemporaneously, but were prepared after issuance of the September 2017 Complaint.

⁴ The location of the silt fence and straw bales installed in the portion of the Site from which sediment flowed onto Cooper Lane in Spring 2016 is erroneously identified as the southeastern corner of the Site in CX 18. The subject area is the *northeastern* corner of the Site.

28, 2016 Inspection Report, CX 18 at 1-2, Mr. Jacobsen emailed inspectors a copy of a Site SWPPP, dated March 17, 2015, CX 13, but did not address any other findings.

The EPA reviewed the SWPPP and identified the following:

- The SWPPP did not contain a list of all potential sources of construction site pollutants, as porta-johns and concrete washout were observed onsite. CX 13 at 8; *see also* CX 18 at 42.
- The SWPPP did not contain a map indicating the locations of all surface waters within or in the immediate vicinity of the Site. A stream (later designated as Main Investigation Tributary 1, or MIT1) was observed to the east of the Site, across Cooper Lane, *see, e.g.*, CX 18 at 40; CX 66 at 13, but was not indicated on any of the SWPPP maps, CX 13 at 26-27, 61.
- The SWPPP did not describe all storm water control measures implemented at the Site. Straw wattles were installed along portions of the eastern Site boundary. CX 18 at 39. Straw wattles were not mentioned in the SWPPP narrative. CX 13 at 10-16. Installation of straw wattles was not indicated on any of the SWPPP maps. CX 13 at 26-27, 61. No design, installation, or maintenance specifications for straw wattles were included in the SWPPP. CX 13.
- The SWPPP did not contain documentation of the expected snow season. CX 13 at 4.
- The SWPPP had not been updated since the start of construction in January 2016 to reflect changes to the Site conditions and storm water controls. CX 13.

These observations and associated requested corrective actions were detailed in a Revised Inspection Report Complainant sent to Respondents and Mr. Jacobsen on November 15, 2016.⁵ Respondents did not provide any evidence corrective actions had been completed until over a year later, when they submitted evidence of some corrective actions in May 2018, discussed below.

The Site's coverage under the Permit expired on November 18, 2016. CX 15. Respondents; construction activities continued at the Site after that date. RX 3 (RESP 46-68); RX 4 (RESP 69-89); RX 5 at 1-4 (RESP 90-93); CX 21; CX 28.

⁵ The EPA's November 15, 2016 Revised Inspection Report is not in the record, but it is not necessary for the Motion or Memorandum.

On March 7, 2017, EPA filed an Administrative Order for Compliance (Docket No. CWA-08-2017-0007) (Order) directing Frostwood 6 LLC and Mr. Jacobsen⁶ to implement corrective actions at the Site within 30 days of receipt of the Order. CX 26. Frostwood 6 LLC and Mr. Jacobsen did not comply with the Order. Respondents and Mr. Jacobsen sent Complainant no evidence of corrective actions implemented in response to the Order until over a year later, when EPA received evidence of some corrective actions in May 2018, mentioned above. CX 49-54.

On April 27, 2017, Mr. Jacobsen submitted an NOI to DWQ, erroneously citing the relevant permit as the General Storm Water Permit for Construction Activity Connected with Single Lot Housing Projects, UPDES Permit No. UTRH00000 (Common Plan Permit). Answer ¶ 57; RX 4 at 47 (“4/27/17: Renewed permit online”). The April 27, 2017 NOI identified the permittees as Frostwood 6 LLC, designated as Site owner, and David Jacobsen Construction, designated as Site operator. Answer ¶ 58.

On April 28, 2017, a DWQ inspector conducted a storm water inspection at the Site. Answer ¶ 59. The DWQ Inspector observed corrective actions at the Site pursuant to the EPA’s August 31, 2016 inspection had not been completed. CX 30 at 2. DWQ also identified Site coverage under the Common Plan Permit as incorrect and renewed the original UPDES Permit Tracking No. UTR373147 effective April 27, 2017, through November 18, 2018. CX 29; Answer ¶ 57. Frostwood 6 LLC also renewed the NOI to extend to May 18, 2019. CX 51 at 33.

Storm water and snowmelt runoff from the Site flow into the Summit County MS4. Depending on the location of the receiving MS4 inlet, runoff from the Site entering the MS4

⁶ Mr. Jacobsen was doing business as David Jacobsen Construction.

flows from the MS4 into one of two nearby unnamed surface water tributaries of East Canyon Creek, referred to as MIT1 and MIT2.

MIT1 and abutting wetlands are located adjacent east of the Site, across Cooper Lane. CX 66 at 12-13. On September 9, 2009, the U.S. Army Corps of Engineers (USACE) issued a preliminary jurisdictional determination that MIT1 and abutting wetlands were waters of the United States (SPK-2009-01203-UO). CX 9. MIT2 is located north of the Site. CX 66 at 5, 13.

Downstream from the points of discharge from the Site, MIT1 and MIT2 converge at MIT3, the first reach of Spring Creek. CX 66 at 12-13. Spring Creek then flows sequentially through two impoundments in the Silver Springs residential community. Upon exiting the first impoundment, the Upper Pond, Spring Creek's flow is split into East Conveyance Tributary (ECT) and West Conveyance Tributary (WCT), both of which flow into the second impoundment, the Lower Pond.⁷ Below the Lower Pond, Spring Creek continues as MIT4 and MIT5, which flow from the Lower Pond through additional residential developments and the Swaner Nature Preserve (the Preserve), then converge at the north end of the Preserve to form MIT6. MIT6 flows under Interstate 80 and converges with East Canyon Creek approximately 2.5 miles north of the Site. CX 66 at 12. East Canyon Creek flows into East Canyon Reservoir.

East Canyon Reservoir is a jurisdictional traditional navigable water, CX 5, and is utilized heavily for year-round water-related recreation, including swimming, fishing, boating, sailboarding, wildlife viewing, and camping, *id.* at 1; CX 59; CX 61.

⁷ Some of the waters receiving or conveying runoff from the Site are referenced in other documents and exhibits by differing names. *See, e.g.*, CX 8 (referring to all stream reaches from MIT3 through and including MIT6 as Spring Creek); CX 79 at 1 (referring to MIT3 as Willow Creek).

IV. ARGUMENT

A Presiding Officer may render an accelerated decision in favor of a party as to any or all parts of the proceeding if no genuine issue of material fact exists and that party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). As this Court recently explained, the governing substantive law determines which facts are material for summary judgment, and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *VSS International, Inc.*, 2018 WL 6930805, at *2-*3 (ALJ 2018) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A factual dispute is genuine if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Id.* The nonmoving party may not rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Id.*

As mentioned above, Complainant requests a ruling solely on liability. “Civil liability under the Clean Water Act is strict,” and the government is not required to show that a defendant knew that his actions violated the CWA to establish liability. *United States v. Bailey*, 571 F.3d 791, 805 (8th Cir. 2009); *see also* 33 U.S.C. § 1319(g). Similarly, there is no need for the government to demonstrate a deleterious effect on downstream waters. *U.S. v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006), *cert. denied*, 549 U.S. 850 (2006).

The CWA authorizes persons engaging in small construction activity to discharge storm water in only compliance with a discharge permit. 33 U.S.C. §§ 1311(a) and 1342(p); 40 C.F.R. §§ 122.26(a)(9)(i)(B) and 122.26(c)(1). Permittees whose small construction activities are covered under a NPDES permit “must comply with all conditions” of the permit. 40 C.F.R. § 122.41(a); CX 15 at 1 (“Becoming a permittee obligates such discharger to comply with the

terms and conditions of the permit.”); CX 29 at 1 (same). The Permit defines “permittee” as “the owner and/or operator named in the NOI for the project.” CX 11 at 64; Answer ¶ 27.

Here, Respondents are liable for CWA violations at the Site—as their small construction activities at the Site caused unpermitted discharges—and for violations of the Permit.

The November 18, 2015 NOI listed “Kent Hoggan” as Site owner and a permittee. CX 15 at 1, 3. Mr. Hoggan’s coverage under the Permit expired on November 18, 2016, *id.* at 1-2; CX 11 at 9, as he “failed to apply for authorization under the Permit to discharge storm water between November 19, 2016, and April 27, 2017.” Answer ¶ 77. Accordingly, Mr. Hoggan is liable for any permit condition violations between November 18, 2015, and November 18, 2016. 40 C.F.R. § 122.41; CX 15 at 1.

Mr. Hoggan was required to submit an Ownership Transfer Form to DWQ if he sold any portion of the Site after his coverage under the NOI began, CX 11 at 53-54, but there is no evidence in the record Mr. Hoggan submitted an Ownership Transfer Form to DWQ or sold any portion of the Site prior to the April 27, 2017 NOI. Therefore, Mr. Hoggan remained a named permittee for this Site through April 27, 2018, when a renewed NOI was submitted and identified “Frostwood 6 LLC” as Site owner and permittee. *See* CX 29 at 1, 3.

Despite the Site’s lapse in Permit coverage, inspection reports from the unpermitted timeframe show Respondents engaged in construction activities at the Site from November 19, 2016, through April 26, 2017. RX 3 (RESP 46-68); RX 4 (RESP 69-89); RX 5 at 1-4 (RESP 90-93); CX 13 at 1; CX 19 at 1; CX 21 at 1; CX 28 at 1. This construction disturbed at least one acre. Answer ¶ 63 (admission for Frostwood 6 LLC); CX 15 at 3 (Mr. Hoggan’s NOI indicated: “Estimated Area to be Disturbed (in Acres): 4.00”). Therefore, Respondents are liable for any

unpermitted discharges of pollutants to waters of the U.S. from November 19, 2016, through April 26, 2017. 33 U.S.C. § 1311(a); 40 C.F.R. § 122.26(a)(9)(i)(B).

The April 27, 2017 NOI identified “Frostwood 6 LLC” as an owner and permittee. Answer ¶ 58. DWQ renewed the original UPDES Permit Tracking No. UTR373147 for a term beginning April 27, 2017. Answer ¶ 57. Frostwood 6 LLC also renewed the NOI to extend to May 18, 2019. CX 51 at 33. Thus, Frostwood 6 LLC is liable for any permit condition violations from April 27, 2017, onward. 40 C.F.R. § 122.41; CX 29 at 1.

For ease of reference, Complainant provides the following table:

November 18, 2015 – November 18, 2016	Mr. Hoggan is a permittee and Site owner
November 19, 2016 – April 26, 2017	No Permit coverage. Respondents are Site owners and/or engaged in construction activity at the Site.
April 27, 2017 onwards	Frostwood 6 LLC is a permittee and Site owner.

A. Claims 1 and 2: Respondents discharged pollutants to waters of the U.S. without a permit between November 19, 2016, and April 26, 2017.

As described in the accompanying Motion, Complainant seeks an accelerated decision on a subset of the violations alleged in Claim 1 and Claim 2 of the Complaint. Complainant requests the Presiding Officer hold Respondents jointly and severally liable for discharges of pollutants from point sources to waters of the U.S. without a permit between November 19, 2016, and April 26, 2017. Complainant is not requesting a ruling from the Presiding Officer on any other allegations that may remain in Claims 1 and 2. Because the evidence of these violations applies equally to both Respondents, this section includes argument and evidence for both claims.

To prove Respondents violated CWA § 301(a), Complainant must prove each Respondent is a person who discharged a pollutant from a point source into navigable waters without a permit under the CWA. *Hubenka*, 438 F.3d at 1035.

The amount or duration of a discharge is not an issue for purposes of liability; any discharge of a pollutant is sufficient for establishing liability if the discharge is unpermitted. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (“Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.”) (emphasis in original).

As demonstrated below, each element of Complainant’s claims that each Respondent is a person who discharged a pollutant from a point source into navigable waters without a permit between November 19, 2016, and April 26, 2017, are established by material facts that are not in genuine dispute. Thus, Complainant is entitled to accelerated decision as a matter of law.

1. Each Respondent is a person.

The CWA defines a “person” as an “individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. §1362(5); 40 C.F.R. § 122.2. Respondents admitted they are each a “person” as defined in 33 U.S.C. §1362(5), and 40 C.F.R. §122.2. Answer ¶¶ 28, 30.

2. Storm water from the Site contains pollutants.

At least one court has concluded as a matter of law that “[s]tormwater runoff from small construction activities (covering one to five acres) constitutes a pollutant discharge.” *Schneider v. Donaldson Funeral Home, P.A.*, 733 F. App’x 641, 647 (4th Cir. 2018) (citing 40 C.F.R. § 122.26(a)(9)(i)(B), (b)(15)(i)). Storm water is defined as storm water runoff, snow melt runoff, and surface runoff and drainage. 40 C.F.R. § 122.26(b)(13). Here, there is no genuine dispute storm water from the Site contained pollutants.

The CWA defines “pollutant” as:

dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat,

wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6).

“‘[S]ediment’ is a pollutant, although not clearly listed” in 33 U.S.C. § 1362(6). *See Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 174 n.56 (D.C. Cir. 1982); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (“water and the suspended sediment therein” constituted a “pollutant”), *adhered to on reconsideration*, 451 F.3d 77 (2d Cir. 2006). As indicated by the legislative history of the CWA, “[s]ediment . . . is by volume our major pollutant, not only from the degrading effect of the sediment, but because it also transports other pollutants.” *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (Staff of Senate Comm. On Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, 1470-1471).

In fact, EPA’s regulation of construction storm water is premised on the fact that storm water from construction sites contains pollutants. According to the preamble to the Phase II regulations, it is “generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use[,]” and numerous studies have demonstrated significant amounts of rock and sand erode from construction sites via storm water runoff. CX 3 at 8; *see also, Env’tl. Def. Ctr. v. EPA*, 344 F.3d 832, 871 (9th Cir. 2003) (upholding the Phase II regulation of small construction sites, based in part on “the support of twenty-some-odd studies of sedimentation from construction sites that EPA reviewed in promulgating the challenged regulations”). Construction sites can also generate other pollutants from onsite wastes, like sanitary wastes or concrete truck washout. CX 11 at 8.

Finally, as EPA explained when it published the Phase II regulations:

Storm water discharges generated during construction activities can cause an array of physical, chemical, and biological water quality impacts. . . . Water

quality impairment results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients (particularly phosphorus), metals, and organic compounds into aquatic systems.

Id. at 7.

Both direct and inferential evidence show storm water from the Site contained pollutants, such as rock, sand, and sediment.⁸ During an inspection of the Site on March 8, 2017, a certified third-party storm water inspector, working on behalf of the Canyons Village Management Association (CVMA), a master development of which the Site is a part, marked “Yes” on an inspection report in response to the prompt: “Was stormwater discharge or other discharge occurring from any part of your site at the time of the inspection?”. RX 3 at 23 of 23 (RESP 68). The CVMA inspector also responded “Yes” to the prompt: “At points of discharge and the channels and banks of surface waters in the immediate vicinity, are there any visible signs of erosion and/or sediment accumulation that can be attributed to your discharge?” *Id.* The CVMA inspector described the discharge as: “Dirty water running off from first lot on right onto roadway and into storm drain – wattle needs to be installed and sediment needs to be removed behind gravel wattle.” *Id.* Similarly, on April 26, 2017, Summit County MS4 Inspector Kyle Monez inspected the Site and found “discharge is occurring during storm runoff” coinciding with a “0.5” inch rainfall event that day. RX 5 at 1-2 (RESP 90-91). These inspectors observed water from the Site containing sediment—which includes rock and sand—entering the MS4.

⁸ In CWA actions, the government can “use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred[.]” *Lowell Vos Feedlot*, CWA Appeal No. 10-01, 2011 WL 1824673, at *7 (EAD May 9, 2011); *In the Matter of Dave Ealanson*, 2018 WL 4859961, at *16 (ALJ Sept. 27, 2018) (Circumstantial evidence may be relied upon as evidence of a material fact.”).

Moreover, strong inferential evidence supports the conclusion storm water runoff from the Site contains pollutants. Photographs of the Site show construction at the Site resulted in disturbed, unstabilized soil on the Site's surface, much of which is steeply sloped. CX 18 at 38-40, 42; CX 30 at 3-5; RX 5 at 4 (RESP 93). This sloping results in increased sediment transport and erosion during storm water runoff events. *See, e.g.*, CX 3 at 51 ("steep slopes . . . lead to increased channelization" of storm water). Inspectors also photographed uncontained concrete washout on the Site throughout construction. CX 18 at 42; CX 30 at 1, 4, 7. The Site conditions; presence of pollutants like sediment, rock, sand, and concrete washout; and the generally acknowledged scientific documentation that storm water runoff from construction sites contains pollutants provide strong inferential evidence storm water runoff from this Site contained pollutants.

Finally, Respondents have submitted no evidence storm water from the Site did not contain pollutants. Based on the foregoing, and the lack of any evidence to the contrary, there is no genuine dispute storm water from the Site contained pollutants.

3. The Site's storm water discharges from point sources.

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. Because 'any' source that meets this definition is a point source, the "definition of a point source is to be broadly interpreted and embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *In the Matter of Dr. Daniel J. McGowan*, 2016 WL 7742871, at *15 (ALJ 2016) (quoting *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188 (2nd Cir. 2010)).

The Phase II regulations define an municipal separate storm sewer as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)[.]” 40 CFR § 122.26(b)(8). An “outfall” is defined as “a point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States[.]”. 40 C.F.R. § 122.26(b)(9).

There is no dispute MS4s and their outfalls are point sources. CX 77 at 4 (“separate storm sewers . . . are point sources under the CWA”); *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1198 n.5 (9th Cir. 2013) (holding “the LA MS4 is a collection of point sources, including outfalls”). at 841 (“Storm sewers are established point sources subject to NPDES permitting requirements.”). Accordingly, a construction site that discharges storm water through an MS4 is a point source. *See California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F.Supp.2d 1059, 1077 (E.D. Cal. 2002) (“By identifying [the d]efendant’s construction activity on the [p]roperty, [the p]laintiff has sufficiently identified a ‘point source.’”); *In the Matter of Service Oil, Inc.*, 2007 WL 3138354, at *61 n.5 (ALJ 2007) (“[T]he NPDES permit system set out in CWA Section 402 on the basis that storm water can transport ‘pollutant(s)’ (*i.e.*, rock, sand, dirt), . . . from construction sites which are ‘point sources,’ as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2”) *overturned on other grounds by Serv. Oil, Inc. v. EPA*, 590 F.3d 545, 546 (8th Cir. 2009).

Respondents engaged in construction activity on the Site that disturbed at least one acre, Answer ¶ 63 (admission for Frostwood 6 LLC); CX 15 at 3 (Mr. Hoggan’s NOI indicated: “Estimated Area to be Disturbed (in Acres): 4.00”), during the unpermitted timeframe, *see, e.g.*, RX 3 (RESP 46-68); RX 4 (RESP 69-89); RX 5 at 1-4 (RESP 90-93); CX 21; CX 28.

The Site's storm water enters the Summit County MS4 at several locations, both on and off the Site.⁹ CX 66 at 5. First, storm water flows into MS4 inlets on and adjacent to the Site, as observed by storm water inspectors. *See* Section IV.A.4, below; RX 3 at 23 (RESP 68) ("Dirty water running off from first lot on right onto roadway and into storm drain"); RX 4 at 1, 4 (RESP 69, 72) ("[w]ater running off into grated inlets"). Storm water entering inlets on and adjacent to the Site flows through a subsurface conveyance under Cooper Lane to a "bubble-up box" across Cooper Lane east of the Site, CX 66 at 5, 22-24; CX 18 at 40, from which storm water flows into MIT1, CX 66 at 5. The bubble-up box provides some retention and infiltration of storm water during lower flows, and overflows to MIT1 during higher flows. Summit County MS4 Inspector Kyle Monez told EPA Inspector Akash Johnson that he has observed water flowing from the bubble-up box and into MIT1 many times. *Id.* at 5.

Second, the Site's Erosion Control Plan shows water from the northern and northeastern portions of the Site flows north and east away from the onsite inlets and down Cooper Lane toward Sun Peak Drive, CX 66 at 22 (Figure A.13), toward offsite inlets referred to as Inlet 1 and Inlet 2, *id.* at 13; *see also id.* at 115 (Inlet 1), 116 (Inlet 2). The Southern MS4 Map (Figure A.15) shows these inlets as purple dots and their conveyances as teal lines. *Id.* at 24. When reviewed with Figure A.4's locations of MIT1 and MIT2, the Southern MS4 Map shows that water entering Inlet 1 is conveyed directly into MIT1 while MIT1 is in the culvert under Sun Peak Drive and that the conveyance from Inlet 2 conveys water into MIT2 after MIT2 has passed under Sun Creek Drive and is on the surface. *Id.* at 13, 24.

⁹ The Site's Erosion Control Plan from the May 2018 SWPPP shows seven inlets located on the Site and three inlets adjacent east of the Site, along the west side of Cooper Lane. CX 50 at 65. Some of these inlets are also pictured in EPA, DWQ, and MS4 inspection reports. *See, e.g.*, CX 18 at 37, 40; CX 19 at 4; CX 20 at 4; CX 30 at 4-5; CX 45 at 4.

This flow path is confirmed by the report of EPA Inspector Akash Johnson, who examined and discussed the Site area; the MS4 inlets, conveyances, and outfalls; and the receiving waterbodies with Summit County MS4 Inspector Kyle Monez. “Storm water entering Inlet 1 would flow via the MS4 into MIT1, as shown on Figure A.15[.]” and “[s]tormwater entering Inlet 2 would flow via the MS4 into MIT2, as shown on Figure A.15.” *Id.* at 5.

The MS4 conveys storm water to MIT1 and MIT2 via inlets, subsurface conveyances, a bubble-up box, and outfalls, which are all “discernible, confined and discrete conveyance[s.]” 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. Indeed, outfalls are point sources by definition. 40 C.F.R. § 122.26(b)(9). By identifying Respondents’ construction activity on the Site and the MS4 that conveys storm water from the Site into MIT1 and MIT2, Complainant “has sufficiently identified a ‘point source.’” *California Sportfishing Protection Alliance*, 209 F.Supp.2d at 1077.

Respondents have submitted no evidence storm water from the Site did not flow from the Site into the MS4, or that the MS4 did not convey storm water from the Site to MIT1 and MIT2. Based on the foregoing, and the lack of any evidence to the contrary, there is no genuine dispute storm water from the Site enters MIT1 and MIT2 “from a point source.”

4. The Site discharged storm water during the unpermitted period:

November 19, 2016, to April 26, 2017.

Direct and inferential evidence in the record from both Complainant and Respondents establishes runoff from the Site was discharged during the unpermitted period: November 19, 2016, to April 26, 2017.¹⁰ The term “discharge of a pollutant” means “any addition of any

¹⁰ The government can “use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred[.]” *Lowell Vos Feedlot*, 2011 WL 1824673, at *7; *Erlanson*, 2018 WL 4859961, at *16 (“Specifically, within the context of the CWA, discharges may be inferred from circumstantial evidence.”); *see also* 40 C.F.R. § 22.22(a)(1).

pollutant to navigable waters from any point source[.]” 33 U.S.C. § 1362(12). The definition “includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works.” 40 C.F.R. § 122.2.

The record contains indisputable, direct evidence of unpermitted discharges. As described above, a CVMA inspector observed and documented a discharge of “[d]irty water running off from first lot on right onto roadway and into storm drain” occurring on March 8, 2017. RX 3 at 23 (RESP 68). On March 22, 2017, the same CMVA inspector observed “[w]ater running off into grated inlets” following a “~0.4” inch rain event on March 21, 2017. RX 4 at 1, 4 (RESP 69, 72). The CMVA inspector documented the discharge location as “[s]torm drain inlets” and one of the “inlets” was so “full of water” she “[c]ould not see” whether there was a grate in the inlet. RX 4 at 2-3 (RESP 70-71). On April 26, 2017, Summit County MS4 Inspector Kyle Monez inspected the Site and found “illicit discharge is occurring during storm runoff” following a “0.5” in rainfall event that day. RX 5 at 1-2 (RESP 90-91). Summit County MS4 Inspector Kyle Monez said he has observed water flowing from the bubble-up box and into MIT1 many times. CX 66 at 5. The direct evidence leaves no dispute storm water from the Site discharged to MIT1 during the unpermitted period.

Moreover, strong inferential evidence supports the conclusion discharges from the Site to MIT1 and MIT2 via the MS4 occurred on at least nine separate days. In estimating the number of days discharges from the Site occurred based on certified precipitation and snowmelt data, Complainant adopted a conservative methodology by assuming days with “Rain, Melted Snow, Etc.” of 0.5 inches or greater would result in discharge from the Site. Complainant’s

methodology aligns with the least stringent precipitation-based, operator-conducted inspection schedule under the Permit: that site inspections be conducted once every 14 days and within 24 hours of the occurrence of a precipitation event of 0.5 inches or greater. CX 11 at 34. This requirement is based on the high likelihood of runoff and flows from precipitation events of 0.5 inches or greater negatively affecting the effectiveness of installed BMPs.¹¹ Given the generally steep slopes along downgradient portions of the Site, particularly those fronting Cooper Lane, it is likely rain or melted snow of less than 0.5 inches would generate discharges of runoff containing pollutants from the Site. Accordingly, Complainant considers this methodology and the 0.5-inch threshold to be very conservative.

Between November 18, 2016, and April 27, 2017, Department of Commerce National Centers for Environmental Information certified precipitation and snowmelt data from the National Oceanic and Atmospheric Administration's Snyderville, Utah weather station (Weather Station ID # USC00427942), located less than a mile northeast of the Site, shows at least nine days with "Rain, Melted Snow, Etc." of 0.5 inches or greater. CX 39. The certified data shows the area near the Site received 1.07 inches on December 10, 2016; 0.65 inches on January 2, 2017; 0.55 inches on January 8, 2017; 0.59 inches on January 11, 2017; 0.63 inches on January 23, 2017; 0.55 inches on February 10, 2017; 0.66 inches on March 21, 2017; 0.72 inches on April 8, 2017; and 0.66 inches on April 24, 2017. CX 39 at 19-23.

¹¹ As more fully discussed in Section IV.B below, multiple storm water, sediment, and pollution prevention BMPs were not properly installed, maintained, or implemented during the unpermitted period, increasing the concentration of pollutants and volume of runoff in any discharges from the Site. *See, e.g.*, CX 18 (EPA's August 31, 2016 inspection report); CX 20 at 4 (MS4's November 16, 2016 inspection report), CX 28 (MS4's April 26, 2018 inspection report); CX 30 (DWQ's April 28, 2017 inspection report). Because the volume of storm water leaving the Site was not impeded by BMPs, it greatly increases the likelihood that flow from such precipitation events reached MIT1 and MIT2.

Direct evidence gathered at the Site supports that the precipitation data is reliable and the 0.5-inch threshold is conservative. The April 26, 2017 MS4 inspection indicates approximately “0.5” inches rain fell that day, causing “illicit discharge occurring during storm runoff.” CX 5 at 1-2 (RESP 90-91). The certified data documents a 0.49 inch “Rain, Melted Snow, Etc.” event on April 26, 2017, CX 39 at 23, supporting the certified data as representative of Site conditions. Additionally, a CVMA inspection on June 13, 2017 indicated discharges were occurring when a “0.22” inch rain event occurred. RX 6 at 19 (RESP 120). The April 26, 2017 and June 13, 2017 inspections shows Complainant’s 0.5-inch threshold is conservative, as runoff from the Site occurred as a result of precipitation events *less* than the 0.5-inch threshold, and such events are not counted in the EPA’s methodology.

Finally, local hydrological information and information provided by Mr. Jacobsen also establish seasonal snowmelt runoff, seeps, and springs caused discharges from the Site during the unpermitted period. Flow from these sources is particularly strong from late winter through early summer when shallow groundwater is replenished by infiltrating snowmelt. CX 66 at 7. Mr. Jacobsen stated he received community complaints in the spring of 2016, because runoff and sediment deposition from the Site flowed onto the adjacent Cooper Lane. CX 18 at 8. He also indicated snowmelt runoff from upgradient portions of the Site contributed to discharges from the Site. *See, e.g.*, CX 18 at 8. Given that the unpermitted period spanned the spring months when snowmelt and resulting overland spring flow generally peaks, it is reasonable to conclude multiple discharges from the Site attributed to snowmelt and overland spring flow occurred during the unpermitted period, beyond those Mr. Jacobsen admitted and the certified precipitation data identified.

In sum, the inspector observations, certified precipitation data, local hydrological information, and Mr. Jacobsen's admissions show runoff associated with Respondents' small construction activity at the Site discharged to MIT1 and MIT2 via the MS4 multiple times between November 19, 2016, and April 26, 2017. Each event constitutes a discharge under the CWA. 33 U.S.C. § 1362(12).

Respondents have submitted no evidence storm water from the Site did not discharge to MIT1 and MIT2 via the MS4. Based on the foregoing, and the lack of any evidence to the contrary, there is no genuine dispute storm water from the Site was discharged to MIT1 and MIT2 and Complainant is entitled to accelerated decision on this element.

5. The waters here constitute navigable waters.

The reaches of waterbodies here—from the MS4 discharge points into MIT1 and MIT2 to East Canyon Reservoir—are waters of the U.S. under the CWA. Both Respondents admitted this in the Answer. Answer ¶ 44. Further, there is no genuine dispute MIT1 and MIT2 are both relatively permanent bodies of water that flow continuously at least seasonally from east and north of the Site, respectively, to their confluence at MIT3, the first reach of Spring Creek. Spring Creek flows into East Canyon Creek, which flows into East Canyon Reservoir, a traditional navigable water. Because the relevant reaches here satisfy the plurality's standard for a water of the U.S. in *Rapanos v. United States*, 547 U.S. 715 (2006), and because Respondents admitted the same, there is no genuine dispute the waters here are waters of the U.S.

a. **Respondents admitted the reaches here are navigable waters.**

In Paragraph 43 of the Complaint, Complainant explained “the Summit County MS4 flows into relatively permanent unnamed tributaries^[12] of East Canyon Creek, which is a relatively permanent tributary of East Canyon Reservoir, which is a traditionally navigable water. East Canyon Reservoir flows again into East Canyon Creek, which is a relatively permanent tributary to the Weber River, which is a relatively permanent tributary to the Great Salt Lake.” Complaint ¶ 44 stated “[t]he Great Salt Lake and its tributaries referenced above [described in Complaint ¶ 43] are and were at all relevant times ‘waters of the United States’ as defined by 40 C.F.R. § 122.2 and therefore ‘navigable waters’ as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7).” Compl. ¶ 44. While Respondents answered that Complaint ¶ 44 called for a legal conclusion, they nonetheless admitted to the allegations in Complaint ¶ 44. Answer ¶ 44.

In his Prehearing Exchange, however, Mr. Hoggan stated that: “Respondent further challenges the jurisdiction, and any factual basis for contending that water discharge from the site entered into any US waterway.” OALJ Index Document # 28 at 4. Mr. Hoggan appears to challenge only whether a discharge from the Site ever traveled through the MS4 and *reached* MIT1 and MIT2, not whether MIT1 and MIT2 constitute waters of the U.S.¹³ This would be consistent with Respondents’ denial of Complaint ¶ 43 and admission of Complaint ¶ 44, as the first half of Complaint ¶ 43 alleges discharges from the Site *reached* MIT1 and MIT2: “[s]torm water, snow melt, surface drainage and runoff have been leaving the Site and have flowed into

¹² The subject “unnamed tributaries” were later identified as MIT1, MIT2, Spring Creek, and its impoundments.

¹³ Complainant notes Respondents have not submitted any evidence into the record that supports this assertion.

the Summit County [MS4 and] the Summit County MS4 flows into relatively permanent unnamed tributaries of East Canyon Creek[.]” But in an abundance of caution, Complainant provides additional evidence the relevant waters here are jurisdictional waters of the U.S. and navigable waters and notes again Respondents have submitted no evidence to the contrary.

b. The evidence shows the reaches here are navigable waters.

i. The plurality standard in *Rapanos* is sufficient to establish regulatory jurisdiction.

The term “navigable waters” is defined as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). In 2006, the U.S. Supreme Court addressed the scope of the term “waters of the United States.” *Rapanos*, 547 U.S. 715. All the Justices agreed the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. *See id.* at 730 (plurality opinion); *id.* at 759 (Kennedy, J. concurring in the judgment); *id.* at 787 (Steven, J. dissenting). However, the Justices disagreed on the scope of the term, which resulted in plurality, concurring, and dissenting opinions. No opinion commanded a majority of the Court. *Id.* at 759 (Roberts, C.J., concurring).

The plurality’s opinion, authored by Justice Scalia, and Justice Kennedy’s concurring opinion articulated different legal standards for the CWA’s term “waters of the United States.” In the plurality opinion, four Justices concluded:

The phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes.”

547 U.S. at 739 (plurality). The plurality stated a tributary constitutes a water of the United States if it is “a relatively permanent body of water connected to traditional interstate navigable waters.” *Id.* at 742. It also explained that in describing waters as “relatively permanent,” it did

“not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought” or “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* at 732 n.5. (emphasis in original). Courts have held a waterbody to be “relatively permanent” under the plurality standard when it flows on “a seasonal basis”; has a “high water mark”; and has a “defined bed and bank.” *See, e.g., United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011), *aff’d*, 492 F. App’x 738 (9th Cir. 2012) (holding these factors also satisfied the significant nexus test).

In his concurrence, Justice Kennedy stated, “to constitute ‘navigable waters’ under the CWA, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759. The four dissenting Justices concluded the term “waters of the United States” encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality’s standard or that of Justice Kennedy. *Id.* at 810.

A Complainant may establish regulatory jurisdiction under the CWA where a water body satisfies either the plurality standard or the Kennedy standard, because in either case a majority of the Court’s Justices would find jurisdiction. *Rapanos*, 547 U.S. at 810 & n.14 (Stevens, J., dissenting) (“the United States may elect to prove jurisdiction under either test.”); *In re: Smith Farm Enterprises, LLC*, 2011 WL 946993, at *19 (EAD March 16, 2011).

ii. The reaches here meet the *Rapanos* plurality’s standard.

The relevant stream reaches in this case are MIT1 and MIT2 from the points where storm water from the Site enters them via the MS4, downstream through connecting waterways and impoundments to East Canyon Reservoir. From the MS4 outfalls conveying water from the Site, MIT1 and MIT2 are relatively permanent tributaries of Spring Creek, which exists at the convergence of MIT1 and MIT2. Spring Creek and its impoundments (MIT3, Upper Pond, East

Conveyance Tributary (“ECT”), West Conveyance Tributary (“WCT”), Lower Pond, MIT4, MIT5, and MIT6) constitute a relatively permanent tributary of East Canyon Creek, which is a relatively permanent tributary of East Creek Reservoir, a traditional navigable water. CX 5. Because MIT1, MIT2, Spring Creek, and East Canyon Creek meet the *Rapanos* plurality standard, they are waters of the U.S. and navigable waters under the CWA. 33 U.S.C. § 1362(7); *Rapanos*, 547 U.S. at 739.

The relatively permanent nature of these waters is supported by observations and information detailed in an inspection report from EPA Inspector Akash Johnson’s inspection of the reaches, CX 66, and Complainant’s Expert Julia McCarthy’s review of the evidence in this case, CX 91. On August 9-10, 2018, Inspector Johnson visited the surface water tributaries to observe, document, and evaluate their connectivity and other relevant attributes. CX 66 at 3. Prior to and during the inspection, Inspector Johnson discussed flow through the tributaries with residents and community members familiar with the area. *Id.* Summit County MS4 Inspector Kyle Monez accompanied Inspector Johnson for the first day of the inspection. *Id.* Inspector Monez and multiple community members said the inspection was occurring during one of the driest times of a relatively dry year. *Id.* at 6. All portions of the inspected tributaries contained flowing or standing water, with three short exceptions detailed below, *id.* at 7, all of which maintain continuous seasonal flow, as described below.

Julia McCarthy is qualified to give expert testimony on the indicia of relatively permanent waters and whether the waterbodies here are relatively permanent, both of which are relevant and material to Claims 1 and 2. 40 C.F.R. § 22.22(a). In addition to holding a Master of Science degree in Ecology from Colorado State University, Ms. McCarthy has worked as an Environmental Scientist at the EPA for over a decade. CX 70 at 1; CX 91 at 2-3. Ms. McCarthy

currently serves as a Region 8 waters of the U.S. expert, which is based, *inter alia*, on her experience reviewing approximately 70 USACE jurisdictional determinations, approximately 80 CWA Section 404 permit applications and projects, regional and national procedures and technical documents regarding the definition of “waters of the U.S.,” and site-specific evaluations of waters of the U.S. jurisdiction. CX 91 at 2-3, ¶ 2. Ms. McCarthy’s testimony is based on her review of relevant information in the record and in publicly available sources, *id.* at 2-3, ¶¶ 5-6, and her application of scientific principles regarding what constitutes a relatively permanent water to the evidence in this case, *id.* at 2, ¶¶ 3-4. Because Ms. McCarthy qualifies as an expert and her testimony is relevant and material, her expert testimony is admissible. *See, e.g., In the Matter of Liphantech, Inc.*, 2011 WL 2626549, at *8-*9 (ALJ 2011).

a. MIT1 is a relatively permanent water.

MIT1 is a relatively permanent water from the point where the Site’s storm water discharges from the MS4 to the confluence with MIT2. MIT1 and abutting wetlands are adjacent to and east of the Site, across Cooper Lane. *See* CX 66. On September 9, 2009, the USACE issued a preliminary jurisdictional determination stating the sections of MIT1 and its abutting wetlands that receive discharges from Site are waters of the U.S. (SPK-2009-01203-UO). CX 9 at 1, 8. MIT1 originates upstream from the Site at a well enclosure. CX 66 at 4, 105. Inspector Johnson observed water flowing out of a pipe north of the well enclosure into MIT1. CX 66 at 105-06. Near MIT1’s origin, Inspector Johnson observed flowing water approximately 2 feet across. *Id.* at 106. North and downstream from the origin, MIT1 flows under a log footbridge. *Id.* at 107. Inspector Johnson observed water flowing in MIT1 upstream and downstream of the footbridge. *Id.* at 107-08. Downstream from the footbridge, Site storm water from onsite and Site-adjacent MS4 inlets enters MIT1 as overflow via the bubble-up box. *See* Section IV.A.3,

above. Inspector Johnson observed water flowing through this reach, which he observed had “a defined bed and bank” as well as a “lack of permanently rooted vegetation in the [stream] bed.” *Id.* at 108-109. Downstream and north of the bubble-up box, MIT1 flows under Bridge 1, a concrete bridge. *Id.* at 109-110. MIT1 has a “defined bed and bank, evidence of erosion, mixed substrate size, and flowing water” in this reach. *Id.* During the separate, August 31, 2016 inspection of the Site, which was also conducted during a relatively dry period of the year, EPA inspectors observed flowing water in MIT1 near Bridge 1. CX 18 at 12. North and downstream of Bridge 1, MIT1 briefly flows through a culvert under a private driveway, CX 66. at 111-112, after which Inspector Johnson observed “flowing water” and a “lack of permanently rooted vegetation in the [stream] bed.” *Id.* at 113.

MIT1 then flows under Sun Peak Drive via a culvert. *Id.* at 114. Storm water from the Site that enters Inlet 1 on Sun Peak Drive is conveyed directly into MIT1 via the MS4 in the stretch of MIT1 flowing through the culvert under Sun Peak Drive. *See* Section IV.A.3, above. Inspector Johnson observed water flowing into and out of the culvert. CX 66 at 114, 117-118. MIT1 has a “defined bed and bank” and “lack[s] vegetation in the channel” immediately after emerging from the culvert under Sun Peak Drive. *Id.* at 117-118. From here, MIT1 flows “overland and through several defined channels” until its confluence with MIT2. *Id.* at 118-120. Inspector Johnson also spoke with Inspector Monez, who provided information consistent with inspection observations supporting that flow moves through MIT1 year-round. *Id.* at 7.

Complainant’s Expert Julia McCarthy concluded MIT1 is a “relatively permanent tributar[y] to East Canyon Reservoir” and “that site factors and physical characteristics of MIT1 support a finding that this water is a relatively permanent water.” CX 91 at 4, 7, ¶¶ 10, 15. Ms. McCarthy reviewed maps and aerial imagery to determine MIT1 is a first order stream. *Id.* at 4, ¶

10. She reviewed climate and streamflow information for the watershed and found it “reasonable to infer that MIT1 has a hydrograph that includes seasonally high flows in spring and early summer, with baseflows that extend beyond spring runoff.” *Id.* Ms. McCarthy also based her opinion on photos that “document the presence of a defined stream channel with ordinary high water mark features, including defined bed and banks, vegetation absent from the channel bed, changes in the character of the soil, [and] sediment sorting and areas of scour.” *Id.* Ms. McCarthy also opined:

The absence of vegetation within the channel indicates that flows are likely maintained throughout much or all of the growing season. If the channel bed were dry, or did not flow during the growing season, the wetland and riparian species near the channel would likely encroach into the channel by late summer. The stream supports areas of wetlands and riparian vegetation adjacent to the stream, indicating the water table is at or near the surface in this area for much or all of the growing season.

Id. Her opinion on MIT1 was also based on the consistent observation of flow in its reach by Frontier Corporation, EPA Inspector Johnson, MS4 Inspector Monez, and local residents. *Id.*

The USACE’s preliminary jurisdictional determination, Inspector Johnson’s observations and photos of MIT1, and Ms. McCarthy’s expert testimony show there is no genuine dispute MIT1 is a relatively permanent water.

b. MIT2 is a relatively permanent water.

MIT2 is a relatively permanent water from the point where the Site’s storm water discharges from the MS4 to the confluence with MIT1. Upstream of where the MS4 discharges into MIT2, Inspector Johnson documented water flowing in MIT2. CX 66 at 116-117. Here, he observed the relatively large size of MIT2’s channel, “the defined bed and bank, and the lack of vegetation growing in the [stream] bed.” *Id.* at 116. He also observed a pool of water “3-4 feet across” with “water flowing out of the pool.” *Id.* at 117. Storm water from the Site that enters

Inlet 2 on Sun Peak Drive enters MIT2 north of both the Site and Sun Peak Drive. *See* Section IV.A.3, above. Downstream of this point, Inspector Johnson observed MIT2 flows through “dense vegetation” to its confluence with MIT1. CX 66 at 119-120. Finally, Inspector Johnson spoke with Inspector Monez, who provided information consistent with inspection observations supporting that flow moves through MIT2 year-round. *Id.* at 7.

Complainant’s Expert Julia McCarthy determined MIT2 is a “relatively permanent tributar[y] to East Canyon Reservoir” and “that site factors and physical characteristics of MIT2 support a finding that this water is a relatively permanent water[.]” CX 91 at 4, 7, ¶¶ 11, 15. Ms. McCarthy reviewed the high resolution National Hydrography Dataset’s mapping of MIT2 as a first-order perennial stream and the National Wetlands Inventory layer’s mapping of MIT2 as a riverine feature. *Id.* at 4-5, ¶ 11. In addition, she reviewed climate and streamflow information for the watershed and found it “reasonable to infer that MIT2 has a hydrograph that includes seasonally high flows in spring and early summer, with baseflows that extend beyond spring runoff.” *Id.* Ms. McCarthy also based her opinion on photos that “document the presence of a defined stream channel with ordinary high-water mark features, including defined bed and banks, vegetation absent from the channel bed, changes in the character of the soil, and sediment sorting.” *Id.* For the same reasons as documented for MIT1, Ms. McCarthy found the absence of vegetation in the channel bed meant “flows are likely maintained throughout much or all of the growing season” and found the dense fringe vegetation supported by MIT2 indicates “the water table is at or near the surface in these adjacent areas for much or all of the growing season.” *Id.* Her opinion MIT2 is a relatively permanent water was also based on the consistent observation of flow in its reach by EPA Inspector Johnson and MS4 Inspector Monez. *Id.*

Inspector Johnson's observations and photos of MIT2, as well as Ms. McCarthy's expert opinion, show there is no genuine dispute MIT2 is a relatively permanent water.

c. Spring Creek is a relatively permanent water.

MIT1 and MIT2 join to form MIT3, the first reach of Spring Creek. Spring Creek then flows downstream as MIT3 and Spring Creek's other reaches and impoundments¹⁴ (Upper Pond, ECT, WCT, Lower Pond, MIT4, MIT5, and MIT6) to its confluence with East Canyon Creek. After the convergence of MIT1 and MIT2, MIT3 flows sequentially through two impoundments in the Silver Springs residential community. Upon exiting the first impoundment, the Upper Pond, the flow is split into ECT and WCT, both of which flow into the second impoundment, the Lower Pond. MIT4 and MIT5 flow from the Lower Pond through additional residential developments and the Swaner Nature Preserve (the Preserve), then converge at the north end of the Preserve to form MIT6. MIT6 flows under Interstate 80 and converges with East Canyon Creek approximately 2.5 aerial (straight) miles north of the Site. CX 66 at 12; CX 91 at 3, ¶ 7. There is no genuine dispute Spring Creek is a relatively permanent water from the beginning of MIT3 to its confluence with East Canyon Creek.

Shortly after MIT3's beginning at the confluence of MIT1 and MIT2, MIT3 flows under a wooden bridge, Bridge 2. At this location, Inspector Johnson observed water flowing and documented MIT3 was 4-5 feet wide, had a "defined bed and bank," and displayed a "lack of permanently rooted vegetation in the bed." CX 66 at 121. From Bridge 2, Inspector Johnson

¹⁴ An impoundment is a man-made waterbody along the reach of a natural waterbody. An impoundment of a water of the U.S. is a water of the U.S. and does not affect whether the water it is impounding is a water of the U.S. 40 C.F.R. § 122.2 (July 1, 2015 ed); *see also In the Matter of Mr. William H. Jarvis*, 2002 WL 550952 *8-10 (ALJ April 5, 2002). The regulatory definition of waters of the U.S. predating the 2015 Clean Water Rule (effective August 28, 2015) applies in Utah, as the 2015 Clean Water Rule was stayed for Utah in *Georgia v. Pruitt*, 2018 U.S. Dist. LEXIS 97223 (S.D. Ga. 2018).

observed water flowing in the various surface reaches and manmade conveyances of MIT3 until it entered the Upper Pond, which is in the Silver Springs community. *Id.* at 121-139. Along this reach, he observed MIT3 maintained its bed, bank, and lack of permanently rooted non-aquatic vegetation; varied in width from one to seven feet; varied in depth from eight to 13 inches; and supported aquatic plants. *Id.* Inspector Johnson also observed trout in MIT3 where it joined Upper Pond. *Id.* at 137-138. Finally, Inspector Johnson spoke with Inspector Monez and area residents, who provided information consistent with inspection observations supporting that flow moves through MIT3 year-round. *Id.* at 7. Specifically, an individual who worked adjacent to MIT3 at the Park City Nursery indicated she had observed MIT3 flowing continuously throughout the 10 years she had worked there. *Id.* at 7, 122. A downstream Silver Springs resident who lived near MIT3's entrance to Upper Pond (the Upper Pond East Inlet) also indicated she had never seen MIT3 stop flowing into the Upper Pond and the flow conditions during the August 9-10, 2018 inspection were approximately as low as she had ever seen. *Id.* at 7, 135-139.

Complainant's Expert Julia McCarthy concluded "that site factors and physical characteristics" of Spring Creek's MIT3 reach support a finding that it "is a relatively permanent tributary" of East Canyon Creek." CX 91 at 5, ¶ 12. Ms. McCarthy reviewed the high-resolution National Hydrography Dataset's mapping of MIT3 as a perennial water and the National Wetlands Inventory layer's mapping of the areas adjacent to Spring Creek as wetlands. *Id.* McCarthy also based her opinion on photos that "document the presence of a defined channel with ordinary high water mark features, including defined bed and banks, vegetation absent from the channel bed, changes in the character of the soil and sediment sorting." *Id.* For the same reasons as above, Ms. McCarthy found the absence of vegetation in the channel bed meant

“flows are likely maintained throughout much or all of the growing season” and found that areas of wetlands and riparian vegetation adjacent to Spring Creek for indicate “the water table is at or near the surface in this area for much or all of the growing season.” *Id.* Her opinion MIT3 is a relatively permanent water was also based on the consistent observation of flow in its reach by Inspector Johnson and local residents. *Id.*

Below MIT3, Spring Creek remains a relatively permanent water. Inspector Johnson observed trout, aquatic algae, ducks, and a significant amount of water in the Upper Pond. CX 66 at 137-138. Inspector Johnson observed water flowing from Upper Pond at two outlet structures in the Upper Pond East Outlet Area into ECT, *id.* at 5, 141-143, as well as at one outlet structure in the Upper Pond West Outlet Area into WCT, *id.* at 5, 145.

Downstream of the Upper Pond East Outlet Area, Inspector Johnson observed algae in ECT, as well as flowing water in all of ECT except approximately 50 feet directly upstream of where ECT flows into Lower Pond, at the Lower Pond East Inlet. *Id.* at 5-6; 142-145, 149; 152-155. In those 50 feet, Inspector Johnson observed standing water, saturated soil in the stream bed, a defined bed and bank, a lack of rooted vegetation, and aquatic plants, and algae on rocks in the stream bed, which was 4-5 feet across near the Lower Pond East Inlet. *Id.* at 148-151. He also spoke with three residents¹⁵ living in the vicinity of ECT and the Lower Pond East Inlet, who stated continuous flow through ECT generally begins around October and continues through mid-August, and ECT’s strongest flows are in the spring. *Id.* at 7. They also indicated even during drier years when continuous flow in ECT does not start in the fall, it usually starts by spring and continues until August. *Id.*

¹⁵ Two of the residents indicated they were familiar with the drainage because they operated a landscaping business in the area. CX 66 at 7.

Downstream of the Upper Pond West Outlet Area, Inspector Johnson observed aquatic plants in WCT, as well as flowing or standing water throughout all of WCT. *Id.* at 146-147.

WCT flows into Lower Pond at the Lower Pond West Inlet. *Id.* at 5, 146-147.

The Lower Pond is located within the Silver Springs community. *Id.* at 5. Inspector Johnson observed a significant amount of water in Lower Pond. *Id.* at 155-156. The Lower Pond flows into MIT4 through an overflow box drain at Lower Pond East Outlet, *id.* at 6, 155-156, and also flows into MIT5 through an overflow box drain at the Lower Pond West Outlet, *id.* at 6, 158-159.

Inspector Johnson observed the bottoms of the side weirs to the east overflow box to MIT4 were approximately two inches above the Lower Pond water level during the August 2018 inspection and that previous water levels above the weirs left a water stain line above the weirs on both the inside and outside of the box drain. *Id.* at 155-156. The Lower Pond East Outlet overflow box drains to MIT4 via a culvert which conveys MIT4 under West Silver Springs Road and daylights on private property (no photographs), directing flow into a surface conveyance before flowing through another culvert underneath West Silver Springs Drive (no flow during the August 2018 inspection). *Id.* at 21, 156-157. Upstream from the culvert under West Silver Springs Drive, Inspector Johnson observed vegetation in the channel lying down in the direction of water would flow. *Id.* at 157. Inspector Johnson did not observe water actively flowing through MIT4 for approximately 1,500 feet^{16,17} of the stream channel immediately downstream of the Lower Pond East Outlet, but he observed vegetation lying down in the direction of flow

¹⁶ A typographical error in CX 66 at 7 erroneously identifies “approximately 1,500 feet of ECT directly downstream from the Lower Pond” as dry, but should identify “approximately 1,500 feet of MIT4 directly downstream from the Lower Pond” as dry.

¹⁷ A typographical error in CX 91 at 6 misidentifies 1,250 feet of MIT4 as dry, but should identify 1,500 feet of MIT4 as dry.

and “engineered rock rip rap” throughout much of the channel. The “engineered rock rip rap” indicates flow moves through the channel, because these manmade features were installed to armor the channel against erosion from flowing water and to slow the flowrate of water thereby reducing its kinetic energy and associated erosion. *Id.* at 156-157. Inspector Johnson observed standing water in MIT4 in the vicinity of Heather Lane, with flowing water observed from Cutter Lane to MIT4’s intersection with MIT5 in the northern end of the Preserve. *Id.* at 169-171, 175-176, 180-184.

Inspector Johnson observed water from Lower Pond flowing into MIT5 via an overflow box drain at Lower Pond West Outlet. *Id.* at 6, 158. He also observed algae on the sides of the overflow box deposited by a previously higher water level, as well as dried algae on the interior of the grate from previous flow over the top of the grate on the overflow box. *Id.* at 158. MIT5 was conveyed from the west overflow box drain into a culvert underneath private property and West Silver Springs Drive. *Id.* at 159. Where the culvert for MIT5 under West Silver Springs Drive daylights on the north side of the road, Inspector Johnson observed standing water, a saturated stream bed, and algae on rocks in the stream bed. *Id.* at 159-160. Downstream of this location, he observed a saturated stream bed and a lack of permanently rooted vegetation in the stream bed until a point upstream and south of Creekside Lane. *Id.* at 160-161. From this point, approximated on Figure A.7, *Id.* at 16, Inspector Johnson did not observe water actively flowing through MIT5 for approximately 1,250 feet^{18,19} of the stream channel until a point north of Heather Lane and South of Cutter Lane, approximated on Figure A.7. *Id.* at 16. In the section of

¹⁸ A typographical error in CX 66 at 7 erroneously identifies “approximately 1,250 feet of WCT north of West Silver Springs Road” as dry, but should identify “approximately 1,250 feet of MIT5 north of West Silver Springs Road” as dry.

¹⁹ A typographical error in CX 91 at 6 misidentifies 1,500 feet of MIT5 as dry, but should identify 1,250 feet of MIT5 as dry.

MIT5 through which no water was flowing during the inspection, Inspector Johnson observed a defined bed and bank, a lack of permanently rooted vegetation in the stream bed, and an 8-foot width in places. *Id.* at 162-164. From the point south of Cutter Lane where water was again observed flowing through MIT5, Inspector Johnson observed continuous flow in MIT5 until its convergence with MIT4 at the northern end of the Preserve. *Id.* at 173-174, 177-180.

The same residents who spoke to Inspector Johnson about the flow of ECT into the Lower Pond indicated flow out of the Lower Pond into MIT4 and MIT5 coincided with the period of continuous flow into Lower Pond: October through mid-August. *Id.* at 7. A representative of the Snyderville Basin Water Reclamation District and Swaner Preserve board member, who said he had mapped flows across the Preserve and was familiar the hydrology of the area, told Inspector Johnson water likely flowed continuously year-round from the Lower Pond through MIT4 and MIT5 into the Preserve during wetter years and always flowed continuously during snowmelt months. *Id.* Another Preserve representative also told Inspector Johnson the Lower Pond usually flowed to the Preserve year-round or for the majority of the year. *Id.* She emphasized this fact by recounting an incident when invasive goldfish released into the Upper and Lower Ponds were found living downstream *in the Swaner Preserve* and had to be removed. *Id.*

Where MIT4 and MIT5 converge in the north end of the Preserve, they form MIT6. CX 66 at 19, 184. MIT6 flows north from the Preserve and under Interstate 80, *id.* at 20, 185-190, to its terminus and confluence with East Canyon Creek. *Id.* at 6, 20. Through the entire reach of MIT6, Inspector Johnson observed water flowing, a defined bed and bank, and a lack of permanently rooted vegetation in the stream bed. *id.* at 184-190.

Complainant's Expert Julia McCarthy concluded "site factors and physical characteristics of Spring Creek and its impoundments" downstream of MIT3 "(...Upper Pond, ECT, WCT, Lower Pond, MIT4, MIT5, and MIT6) support a finding that Spring Creek is a relatively permanent tributary" of East Canyon Creek. CX 91 at 5, ¶ 12. Ms. McCarthy reviewed aerial photography, Inspector Johnson's August 2018 Inspection Report, and other evidence as set forth in her Declaration and determined the "the connectivity of [Spring Creek's] waterways depicted in page 12 of CX 66 is accurate." *Id.* Regarding ECT and WCT, Ms. McCarthy explained the flow observed in these channels during the August 2018 inspection and the associated photographs documenting the presence of defined bed and banks and other indicators of ordinary high water support a finding Spring Creek is a relatively permanent water.

Regarding MIT4 and MIT5, Ms. McCarthy noted they contained "two distinct channels" and "photographs ... document the presence of defined bed and banks and other indicators of ordinary high water within these channels." *Id.* Even though MIT4 and MIT5 included reaches without standing or flowing water during the August 2018 inspection, Ms. McCarthy determined "continuous seasonal flows are likely maintained" in these reaches, including "throughout much or all of the growing season[.]" "given that vegetation is absent from the channel bed[.]" *Id.* She also based her opinion on "observations by local residents that water flows from the Lower Pond into these channels (MIT4 and MIT5) year-round in wetter years and at least seasonally in other years." These observations are consistent with "the limited gage record from Spring Creek at its confluence with East Canyon Creek" that "document year-round flow, with seasonally high flows between March and July" and "StreamStats analysis at the gage location [that] also predicts flow year-round, with peak flows substantially higher than mean annual flow." *Id.* at 3, ¶ 8 and at 5, ¶ 12. She also based her opinion Spring Creek is a relatively permanent tributary on

the fact that downstream of the non-flowing reaches, MIT4 and MIT5 had “bed and bank and other ordinary high water mark features and flow” through the Preserve and their convergence to form MIT6. *Id.* at 5, ¶ 12.

Inspector Johnson’s observations and photos of Spring Creek, as well as Ms. McCarthy’s expert opinion, show Spring Creek is a “geographic feature” described in ordinary parlance as a “stream” or “river,” the vast majority of which flows year-round. *See Rapanos*, 547 U.S. at 739. Spring Creek is a relatively permanent water because it is a “*seasonal* river[,] which contain continuous flow during some months of the year but no flow during dry months[,]” even though portions of Spring Creek do not contain standing or flowing water at all times, *See id.* at 732 n.5; CX 66 at 7. Thus, there is no genuine dispute Spring Creek is a relatively permanent water.

d. East Canyon Creek is a relatively permanent water.

East Canyon Creek contains year-round flow and is a relatively permanent tributary of East Canyon Reservoir. Inspector Johnson observed water flowing in East Canyon Creek above, at, and downstream of its confluence with MIT6. CX 66 at 190-191. These observations are consistent with gage record of Spring Creek at its confluence with East Canyon Creek documenting year-round flow and Complainant’s Expert Julia McCarthy’s StreamStats analysis at the gage location that also predicts flow year-round. *See* CX 85; CX 86; CX 91 at 3, ¶ 8. Accordingly, there is no genuine dispute East Canyon Creek is a relatively permanent water that flows into East Canyon Reservoir, a traditional navigable water.

e. East Canyon Reservoir is a traditional navigable water.

East Canyon Reservoir is both navigable-in-fact and used in interstate commerce. USACE issued a Navigable-In-Fact determination for East Canyon Reservoir on June 16, 2008 (SPK-2008-00529). CX 5. East Canyon State Park (the Park) includes East Canyon Reservoir

and lands surrounding its shores, CX 10 at 26, and the Park's homepage shows people using many types of boats on East Canyon Reservoir, CX 61, supporting that it is navigable-in-fact. Further, East Canyon Reservoir is utilized heavily for year-round water-related recreation, including swimming, fishing, boating, sailboarding, wildlife viewing, and camping. CX 5, CX 61. This recreational activity involves interstate commerce, as evidenced by the Park's "Rentals and Food" page, which explains a company called Club Rec rents wakeboard and ski boats, pontoon boats, fishing boats, jet skis, kayaks, canoes, pedal boats, and water trampolines. CX 59. Because East Canyon Reservoir is both navigable-in-fact and used in interstate commerce, there is no genuine dispute East Canyon Reservoir is a navigable water. 33 U.S.C. § 1362(7).

Respondents have submitted no evidence in the record that the reaches of MIT1 and MIT2 from the Site through East Canyon Reservoir do not meet the *Rapanos* plurality's standard for waters of the U.S. Based on the foregoing, and the lack of any evidence to the contrary, there is no genuine dispute the reaches here were at all relevant times "waters of the United States" under the test established by the *Rapanos* plurality and therefore "navigable waters" as defined by 33 U.S.C. § 1362(7).

6. Respondents' discharges between November 19, 2016, and April 26, 2017, were unpermitted.

From November 19, 2016, to April 26, 2017, discharges from Respondents' construction activity on the Site were not covered by a discharge permit. As mentioned above, on November 18, 2015, Mr. Hoggan and CBM Leasing LLC submitted an NOI to DWQ for authorization to discharge storm water associated with construction activity in compliance with the terms and conditions of the Permit. CX 15. The NOI listed "Kent Hoggan" as Site owner and a permittee. *Id.* at 1, 3. DWQ authorized the Site's coverage under the Permit and assigned Site-specific

UPDES Permit Tracking No. UTR373147. *Id.* Mr. Hoggan's coverage under the Permit expired on November 18, 2016, unless his NOI was properly renewed. *Id.* at 1-2; CX 11 at 9. Mr.

Hoggan "failed to apply for authorization under the Permit to discharge storm water between November 19, 2016, and April 27, 2017." Answer ¶ 77. As there is no evidence in the record that anyone applied to authorize discharges from the Site under the Permit between November 19, 2016, and April 26, 2017, the Site's coverage expired on November 18, 2016.

Despite Respondents' lapse in coverage under the Permit, inspection reports from this timeframe evidence construction activities continued at the Site from November 19, 2016, through April 26, 2017. RX 3 (RESP 46-68); RX 4 (RESP 69-89); RX 5 at 1-4 (RESP 90-93); CX 21; CX 28. Although Mr. Hoggan was required to submit an Ownership Transfer Form to DWQ if he sold any portion of the Site after his coverage under the NOI began, CX 11 at 53-54, there is no evidence in the record Mr. Hoggan submitted an Ownership Transfer Form to DWQ or sold any portion of the Site prior to the April 27, 2017 NOI. Inspection reports and the Site's SWPPP evidence show Frostwood 6 LLC was also involved in the Site's construction activities from November 19, 2016, through April 26, 2017. RX 3 (RESP 46-68); RX 4 (RESP 69-89); RX 5 at 1-4 (RESP 90-93); CX 13 at 1; CX 21; CX 28.

The April 27, 2017 NOI submitted by Mr. Jacobsen and corrected by DWQ identified "Frostwood 6 LLC" as an owner and permittee. Answer ¶ 58.

Based on the information above, there is no genuine dispute any discharges of pollutants from Respondents' construction activity at the Site from November 19, 2016, through April 26, 2017, were not covered by a CWA discharge permit. Therefore, Complainant is entitled to an accelerated decision on this element.

B. Claim 3: Respondents violated permit conditions.

As described in the accompanying Motion, Complainant seeks an accelerated decision on a subset of the violations alleged in Claim 3. Complainant requests the Presiding Officer hold Kent Hoggan strictly liable for permit condition violations occurring at the Site between November 18, 2015, and November 18, 2016. Additionally, Complainant requests the Presiding Officer hold Frostwood 6 LLC strictly liable for permit condition violations occurring at the Site from April 27, 2017, onward. Complainant is not seeking an accelerated decision on any allegations of Claim 3 not addressed below. As the Permit's conditions applied to both Respondents during their respective permit periods, this section explains the permit conditions once and provides evidence of violations in Respondents' respective permit periods.

Permittees whose construction activities are covered under a NPDES permit "must comply with all conditions" of the permit. 40 C.F.R. § 122.41(a); CX 15 at 1 ("Becoming a permittee obligates such discharger to comply with the terms and conditions of the permit."); CX 29 at 1 (same). The Permit defines "permittee" as "the owner and/or operator named in the NOI for the project." CX 11 at 64; Answer ¶ 27.

The November 18, 2015 NOI named "Kent Hoggan" as an owner of the Site. CX 15 at 1, 3. The April 27, 2017 NOI named "Frostwood 6 LLC" as an owner of the Site. CX 29 at 1; Answer ¶ 58. Accordingly, Mr. Hoggan, as a named permittee on the initial NOI, was subject to the Permit from November 18, 2015, through November 18, 2016. CX 15. Similarly, Frostwood 6 LLC, as a named permittee on the renewed NOI, was subject to the Permit beginning April 27, 2017, through May 18, 2019. CX 29; CX 51 at 33. The conditions of the Permit were the same during Mr. Hoggan's and Frostwood 6 LLC's coverage. *See* CX 15; CX 29; CS 51. Therefore,

the Permit's conditions applied to both Respondents in their respective periods of permit coverage.

1. SWPPP Violations

The Permit requires, among other things, permittees to prepare a SWPPP consistent with the requirements of Part 7 of the Permit prior to submitting the NOI and annual permit fee. CX 11 at 9 (Permit, Part 1.4); Answer ¶ 21. The SWPPP and related SWPPP maps must be continuously updated and maintained throughout the duration of construction activities to reflect changes to site conditions and storm water controls. *See, e.g.*, CX 11 at 51 (Permit, Part 7.4); Answer ¶ 23. Permittees must implement BMPs designed to prevent or reduce the discharges of pollutants from a site. *See, e.g.*, CX 11 at 12 (Permit, Part 2); Answer ¶ 22. BMPs include the installation of storm water controls, pollution prevention controls, perimeter controls, and erosion and sediment controls, including temporary and permanent stabilization of disturbed areas. *See, e.g.*, CX 11 at 12 (Permit, Part 2). The Permit also requires permittees to conduct and document routine site inspections, *see, e.g.*, CX 11 at 43 (Permit, Part 4), and implement and document corrective actions taken to repair any BMPs or correct a Permit violation, *see, e.g.*, CX 11 at 40 (Permit, Part 5); Answer ¶ 23.

From at least August 31, 2016, until Respondents updated the SWPPP on May 21, 2018, the SWPPP for the Site failed to meet the requirements under Permit Part 7. Each finding in the subparagraphs below is a failure to develop a SWPPP in compliance with Part 7 of the Permit and is a separate violation of the Permit's conditions and limitations. *See* 40 C.F.R. § 122.41(a).

a. Pollutant generating activities

Permittees “must include . . . [a] list and description of all the pollutant-generating activities” on a site in the SWPPP. CX 11 at 46 (Permit, Part 7.2.6). The Permit explains

“[e]xamples of pollutant-generating activities include, but are not limited to: paving operations; *concrete*, paint, and stucco *washout* and waste disposal; *solid waste storage and disposal*; and dewatering operations.” *Id.* at 46 n.22. (emphasis added). On August 31, 2016, EPA inspectors at the Site observed two pollutant-generating activities: uncontained concrete washout and porta-johns. CX 18. On April 28, 2017, a DWQ inspector observed uncontained concrete washout porta-johns on the Site. RX 6 at 9 (RESP 110). The SWPPP did not include these two pollutant-generating activities from August 31, 2016, until it was updated on May 21, 2018. CX 13 at 8; CX 49; CX 50 at 8. Therefore, Mr Hoggan and Frostwood 6 LLC violated of Part 7.2.6 of the Permit and 40 C.F.R. § 122.41(a).

b. Surface water locations

Permittees “must include . . . [l]ocations of all surface waters, including wetlands, that exist within or in the immediate vicinity of the site” in the SWPPP’s site map. CX 11 at 45 (Permit, Part 7.2.5.b). MIT1 is a stream immediately across Cooper Lane east of the Site. *See* Section IV.A.5.b.ii.a, above. MIT1 was not included in the SWPPP’s Site map from August 31, 2016, until it was updated on May 21, 2018. CX 13 at 26-27; CX 49 at 1; CX 50 at 28, Therefore, Mr Hoggan violated Part 7.2.5.b of the Permit and 40 C.F.R. § 122.41(a) from November 18, 2015, through November 18, 2016, and Frostwood 6 LLC violated Part 7.2.5.b of the Permit and 40 C.F.R. § 122.41(a) from April 27, 2017 to May 20, 2018.

c. Description of storm water control measures

Permittees “must describe all storm water control measures that are or will be installed and maintained” at a site in the SWPPP. CX 11 at 46 (Permit, Part 7.2.9). The Permit defines “storm water control measure” as “any storm water control, BMP, or other method (including narrative effluent limitations) used to prevent or reduce the discharge of pollutants.” CX 11 at

66. On August 31, 2016, EPA inspectors observed straw wattles along portions of the eastern, downgradient property boundary of the Site fronting Cooper Lane. CX 18 at 39. These straw wattles were not described in the SWPPP from August 31, 2016, until it was updated on May 21, 2018. CX 13 at 10-11, 14-16, 36-62; CX 49 at 1; CX 50 at 11, 15, 37-39, 66. Therefore, Mr Hoggan violated Part 7.2.9 of the Permit and 40 C.F.R. § 122.41(a) from August 31, 2016, through November 18, 2016, and Frostwood 6 LLC violated Part 7.2.9 of the Permit and 40 C.F.R. § 122.41(a) from April 27, 2017 through May 20, 2018.

d. Changes to storm water control measures²⁰

Permittees “must modify [the] SWPPP, including the site map(s)” whenever permittees “make changes to [their] construction plans, storm water control measures, pollution prevention measures, or other activities at [their] site that are no longer accurately reflected in [the] SWPPP.” CX 11 at 51 (Permit, Part 7.4.1.a). Mr. Jacobsen stated to EPA inspectors that, in Spring 2016, Respondents received community complaints following sediment from the Site flowing onto Cooper Lane. *See e.g.*, CX 18 at 8. Mr. Jacobsen indicated two storm water control measures—silt fence and straw bales—were installed in the northeastern corner of the Site in response to these community complaints. CX 18 at 8, 39. The Spring 2016 addition of silt fence and straw bales in this portion of the Site was not described in the SWPPP at any point while these controls were implemented at the Site, including from the August 31, 2016 EPA inspection until the silt fence and straw bales were removed and the area was stabilized in September 2017. CX 13 at 10-11, 14-16, 36-62, CX 51 20-21 (referencing CX 51 at 2). Therefore, Mr Hoggan violated Part 7.4.1.a of the Permit and 40 C.F.R. § 122.41(a) from at least August 31, 2016,

²⁰ In this memo, Complainant is seeking accelerated decision on only one violation regarding the facts of this subsection, which were originally pleaded as two separate violations. *See* OALJ Document Index #1 at ¶ 82(d)-(e).

through November 18, 2016, and Frostwood 6 LLC violated Part 7.4.1.a of the Permit and 40 C.F.R. § 122.41(a) from April 27, 2017 through August 31, 2017. The SWPPP was updated to reflect then-current Site conditions on May 21, 2018, CX 49; CX 50, by which time the silt fence and straw bales were no longer installed in the subject area of the Site, CX 51 at 20-21 (referencing CX 51 at 2).

e. Training documentation

Permittees “must include documentation that the required personnel were trained in accordance with [the staff training requirements in] Part 6 [of the Permit]” in the SWPPP. CX 11 at 49 (Permit, Part 7.2.12). During the EPA’s August 31, 2018 inspection, Mr. Jacobsen identified himself as the person responsible for installing and maintaining BMPs and conducting inspections of the Site. CX 18 at 5. From August 31, 2016 to the present, neither the original SWPPP nor the updated SWPPP contained documentation the required personnel (Mr. Jacobsen) were training in accordance with the staff training requirements of Part 6 of the Permit. CX 13 at 22, 34; CX 50 at 23, 35. Therefore Mr. Hoggan violated Part 7.2.12. of the Permit and 40 C.F.R. § 122.41(a) from November 18, 2015, to November 18, 2016, and Frostwood 6 LLC violated Part 7.2.12. of the Permit and 40 C.F.R. 122.41(a) from April 27, 2017 to present, March 1, 2019. On May 22, 2018, Mr. Jacobsen attended a storm water training course. RX 8 at 7 (RESP 201). Mr. Jacobsen has not provided any documentation of this training to the EPA, but the EPA was able to identify him as a Registered Storm Water Inspector (RSI) on the Utah RSI database, maintained online.²¹

²¹ See Utah RSI database, <https://www.utahltap.org/swppp/inspectors.php?type=rsi> (accessed February 27, 2019).

f. Documentation of snow season

“For projects at high altitudes that expect long seasons of heavy snow,” permittees “must document in [the] SWPPP when the snow season is expected so spring runoff controls can be installed before snowfall.” CX 11 at 46 (Permit, Part 7.2.9.a.iv). The Site is located at high elevation, approximately 6,700 feet above sea level, *see e.g.*, CX 13 at 61, “where approximately 65% to 75% of the annual precipitation occurs in the winter months predominantly in the form of snow[,]” CX 10 at 28 (“Mean annual precipitation in the East Canyon drainage is 26 to 37 inches (66–94 cm) per year, 73% of which occurs as snow from October to April”); *see also* CX 39 (certified precipitation data). The SWPPP did not include snow season information for the Site from the August 31, 2016 inspection until the SWPPP was updated on May 21, 2018. CX 13 at 4; CX 50 at 4. Therefore Mr. Hoggan violated Part 7.2.9.a.iv of the Permit and 40 C.F.R § 122.41(a) from November 18, 2015, to November 18, 2016, and Frostwood 6 LLC violated Part 7.2.9.a.iv of the Permit and 40 C.F.R 122.41(a) from April 27, 2017 to May 20, 2018.

2. Respondents failed to sign the NOIs.

The owner of a site who is applying for Permit coverage is required to sign the NOI. CX 11 at 4 (Permit, Part 1.1.1). The November 18, 2015 NOI submitted to DWQ named “Kent Hoggan” as an owner of the Site. CX 15 at 1, 3. Mr. Hoggan did not sign the November 18, 2015 NOI submitted to DWQ at any point between November 18, 2015 and November 18, 2016. CX 15 at 3.

The April 27, 2017 NOI submitted to DWQ named “Frostwood 6 LLC” as an owner of the Site. CX 29 at 1, 3. The EPA’s March 7, 2017 Administrative Order required the “Owner and Operator file a NOI” to obtain permit coverage (Corrective Action for Finding 1) and “correctly complete and certify the new NOI” and “provide a copy of the certified NOI” to the EPA

(Corrective Action for Finding 2). CX 26 at 9. From April 27, 2017 to the May 18, 2018 NOI renewal, EPA did not receive a signed copy of the April 27, 2017 NOI shown in CX 29. Mr. Hoggan's and Frostwood 6 LLC's failures to sign their respective NOIs are violations of Part 1.1.1 of the Permit and 40 C.F.R. § 122.41(a).

3. Respondents are responsible for permit implementation violations.

As first observed on August 31, 2016, Respondents have failed to implement, or are otherwise in violation of, numerous Permit conditions described below. Each is a separate violation of the Permit. 40 C.F.R. § 122.41.

a. Pre-construction perimeter sediment controls

Prior to the commencement of earth-disturbing activities, permittees must install sediment controls along perimeter areas of the Site that will receive storm water from the earth disturbing activities, unless it is infeasible. CX 11 at 13 (Permit, Part 2.1.1.c.i). Earth disturbing activities began at the Site at least as early as January 7, 2016. Answer ¶ 40; CX 18 at 11. As shown in the Site's Erosion Control Plan, storm water from the northeast portion of the Site flows northeast away from all of the eastern-adjacent inlets on Cooper Lane and onto the northern adjacent property and eastern adjacent Cooper Lane. CX 13 at 61. The northeast corner of the Site did not have perimeter controls until the silt fence and straw bales were installed in Spring 2016, in response to community complaints from sediment flowing onto Cooper Lane. CX 18 at 8.²² Mr. Hoggan failed to install perimeter controls prior to commencing earth disturbing activities in the northeast portion of the Site, in violation of Part 2.1.1.c.i of the Permit and 40 C.F.R. § 122.41.

²² As described above, the location of the silt fence and straw bales installed in the portion of the Site from which sediment flowed onto Cooper Lane in Spring 2016 is erroneously identified as the southeastern corner of the Site in CX 18. The subject area is the Site's northeastern corner.

b. Sediment control maintenance – silt fence

Permittees must ensure erosion and sediment controls remain in effective operating condition during permit coverage and, if controls are found to need replacement, repair or maintenance, the repairs must be made immediately after discovery. CX 11 at 13, 40 (Permit, Parts 2.1.1.d. and 5.2). On August 31, 2016, EPA inspectors observed the silt fence installed as a perimeter control along portions of the eastern, downgradient boundary had not been maintained, as it was detached from the supporting stakes at several locations along portions of the fence. CX 18 at 38, 39. To date, Respondents have not submitted evidence to Complainant or to the record showing the silt fence was repaired at any point between the August 31, 2016 inspection until the silt fence was removed and the area was stabilized in September 2017, CX 51 at 20-21 (referencing CX 51 at 2), despite being informed of the violation by Complainant on multiple occasions. *See, e.g.*, CX 18 at 7-9; CX 26 at 17-19. Therefore, Mr. Hoggan failed to maintain the silt fence from August 31, 2016, to November 18, 2016, and Frostwood 6 LLC failed to maintain the silt fence from April 27, 2017, to August 31, 2017, in violation of Parts 2.1.1.d. and 5.2 of the Permit and 40 C.F.R. § 122.41.

c. Sediment control maintenance – straw wattles

Permittees must ensure erosion and sediment controls remain in effective operating condition during permit coverage and, if controls are found to need replacement, repair or maintenance, the repairs must be made immediately after discovery. CX 11 at 13, 40 (Permit, Parts 2.1.1.d. and 5.2). On August 31, 2016, EPA inspectors observed the straw wattles installed along portions of the eastern, downgradient Site boundary fronting Cooper Lane were flattened. CX 18 at 38, 39. To date, Respondents have not submitted evidence to Complainant or to the record showing the straw wattles were repaired at any point between the August 31, 2016

inspection until the straw wattle was removed and the area was stabilized in September 2017, CX 51 at 20-21 (referencing CX 51 at 2), despite being informed of the violation by Complainant on multiple occasions. *See, e.g.*, CX 18 at 8; CX 26 at 17-19. Therefore, Mr. Hoggan failed to maintain the straw wattles from August 31, 2016 to November 18, 2016, and Frostwood 6 LLC failed to maintain the straw wattles from April 27, 2017, to August 31, 2017, in violation of Parts 2.1.1.d and 5.2 of the Permit and 40 C.F.R. § 122.41.

d. Perimeter controls

Permittees “must install sediment controls along those perimeter areas of [the] site that will receive storm water from areas where earth disturbing activities are occurring.” CX 11 at 16-17 (Permit, Part 2.1.2.b.i). As shown in the Site’s Erosion Control Plan, storm water from the eastern portion of the site flows away from onsite inlets and toward the eastern, downgradient Site boundary fronting Cooper Lane. CX 13 at 61. On August 31, 2016, EPA inspectors observed the Site did not have any perimeter controls installed along some portions of the eastern, downgradient Site boundary fronting Cooper Lane. CX 18 at 38-39. To date, Respondents have not submitted evidence to Complainant or to the record showing perimeter controls were installed any point between the August 31, 2016 inspection until the area was stabilized in September 2017, CX 51 at 20-21 (referencing CX 51 at 2), despite being informed of the violation by Complainant on multiple occasions. *See, e.g.*, CX 18 at 7; CX 26 at 17-19. Therefore, Mr. Hoggan failed to install perimeter controls installed along portions of the eastern, downgradient Site boundary from August 31, 2016, to November 18, 2016, and Frostwood 6 LLC failed to do so from April 27, 2017, to August 31, 2017, in violation of Part 2.1.2.b.i of the Permit and 40 C.F.R. § 122.41.

e. Inspection reports

Permittees must complete inspection reports within 24 hours of each inspection and records of each inspection must be maintained onsite or in an accessible location. CX 11 at 37-38 (Permit, Part 4.1.7). On August 31, 2016, Mr. Jacobsen—who presented himself to EPA inspectors as the Site’s superintendent, general contractor, and project manager—stated to the EPA inspectors that inspections of the Site were conducted daily. CX 18 at 3-4. However, when EPA inspectors requested to review the inspection reports, Mr. Jacobsen said no storm water-related documents other than the NOI were maintained for the Site. CX 18 at 3-4, 12. Respondents have stipulated that Mr. Jacobsen’s inspection reports contained in RX 1 through RX 7 were not made contemporaneously with the inspections, but were created after the September 2017 Complaint.

Inspections through at least August 31, 2017, also documented no inspection records were being maintained. RX 1 at 3 (RESP 3) (“Contractor Maintaining Records of Inspections?: No”), at 10 (RESP 10), at 17 (RESP 17); RX 2 at 1 (RESP 24), at 8 (RESP 31); RX 3 at 4; CX 30 at 1, 6, 7; RX 6 at 12 (RESP 113) (“Mr. Jacobsen stated that he has been inspecting but not documenting his inspections.”); RX 4 at 1 (RESP 69); RX 6 at 19 (RESP 120), at 25 (RESP 126), at 35 (RESP 136), at 42 (RESP 143). Because inspection reports were not completed or maintained onsite or an accessible location, Mr. Hoggan violated Part 4.1.7 of the Permit and 40 C.F.R. § 122.41 between January 7, 2016, and November 18, 2016, and Frostwood 6 LLC violated Part 4.1.7 of the Permit and 40 C.F.R. § 122.41 from April 28, 2017, through at least August 31, 2017.

f. Washout containment

Permittees must contain all washout of concrete, paint or other construction materials in a leak-proof container. CX 11 at 30-31 (Permit, Part 2.3.3.d). On August 31, 2016, EPA inspectors observed uncontained concrete washout in the southeast area of the Site. CX 18 at 42. On April 28, 2017, a DWQ inspector observed concrete washout on the Site and documented it was a “repeat finding[] from an inspection conducted on August 31, 2016 by Akash Johnson of EPA Region 8.” CX 30 at 1-2, 4, 7. Accordingly, both Mr. Hoggan and Frostwood 6 LLC violated Part 2.3.3.d of the Permit and 40 C.F.R. § 122.41 during their respective periods of Permit coverage.

g. Soil stabilization

For areas receiving annual precipitation of 20 inches or more per year, permittees must ensure soil stabilization measures are implemented within 14-days of when the earth-disturbing activities have permanently or temporarily ceased. CX 11 at 22 (Permit, Part 2.2). “Mean annual precipitation in the East Canyon drainage is 26 to 37 inches (66–94 cm) per year[.]” CX 10 at 28. On August 31, 2016, EPA inspectors observed that along the northern boundary of the property, approximately 70% of the soil in a disturbed area was un-stabilized. CX 18 at 38. Mr. Jacobsen stated to EPA inspectors that the area had been at final grade for more than 14 days prior to the inspection and no additional stabilization was planned for approximately 50 days after the inspection. Summit County MS4 Inspector Kyle Monez photographed this same area of the Site remaining un-stabilized on October 31, 2016, CX 19 at 4, approximately 60 days after the EPA’s inspection, and on April 26, 2017, CX 28 at 4, approximately 238 days after the EPA’s inspection. Accordingly, Mr. Hoggan, a permittee, violated Part 2.2 of the Permit and 40 C.F.R. § 122.41. from at least August 31, 2016, through November 18, 2016.

On April 28, 2017, a DWQ inspector noted “the [S]ite contains disturbed areas and stockpile[s] of soil which have had no activity for greater than 14 days ... [t]he contractor had no immediate plans to resume work in the disturbed areas or initiate stabilization measures” and documented it was a “repeat finding[] from an inspection conducted on August 31, 2016, by Akash Johnson of EPA Region 8.” CX 30 at 1-2. To date, Respondents have not submitted evidence to Complainant or to the record showing this area was stabilized at any point between the EPA’s August 31, 2016 inspection until the area was stabilized in September 2017, CX at 51 20-21 (referencing CX 51 at 2), despite being informed of the violation by Complainant, the MS4, and DWQ on multiple occasions (as cited above). Accordingly, Frostwood 6 LLC, as a permittee, violated Part 2.2 of the Permit and 40 C.F.R. § 122.41 from April 27, 2016, until August 31, 2017.

h. Inspection certification

Permittees are required to ensure that each individual responsible for conducting inspections must be a “qualified person” and “currently certified” in one of the certification programs provided in Part 4.1.1. of the Permit or other similar certification program. CX 11 at 34 (Permit, Part 4.1.1). On August 31, 2016, Mr. Jacobsen identified himself to EPA inspectors as the individual responsible for conducting inspections of the Site, but indicated he had not received any formal storm water training or certification. CX 18 at 4. On April 28, 2017, a DWQ inspector observed “[i]nspections by a ‘qualified person’ were not being performed and documented per permit requirements.” CX 30 at 1, 7. The DWQ inspector documented this was a “repeat finding[] from an inspection conducted on August 31, 2016 by Akash Johnson of EPA Region 8.” *Id.* at 2. Accordingly, Mr. Hoggan, a permittee, violated Part 4.1.1 of the Permit and 40 C.F.R. § 122.41 from January 7, 2016, through November 18, 2016.

On May 22, 2018, Mr. Jacobsen attended a storm water training course. RX 8 at 7 (RESP 201). To date, Respondents have not provided any documentation of this training to Complainant, but Complainant was able to identify Mr. Jacobsen as a Registered Storm Water Inspector (RSI) on the Utah RSI database, maintained online.²³ Accordingly, Frostwood 6 LLC, a permittee, violated Part 4.1.1 of the Permit and 40 C.F.R. § 122.41 from April 27, 2017, through May 21, 2018.

i. SWPPP request

Permittees “are required to maintain a current copy of the project SWPPP at every active construction site where this permit is required,” and “[r]equests for a copy of the SWPPP by a regulatory authority (DWQ, EPA, or an MS4), must be accommodated within 72 hours[.]”CX 11 at 50 (Permit, Part 7.3). On August 31, 2016, EPA inspectors requested a copy of the Site’s SWPPP upon arrival at the Site. CX 18 at 12. Mr. Jacobsen stated to inspectors that the SWPPP was not maintained onsite. CX 18 at 12, 14. The EPA inspectors then requested a copy of the SWPPP be submitted to them for remote review after the inspection. *Id.* Site representatives did not produce the SWPPP to the EPA within 72 hours of Complainant’s request. Accordingly, Mr. Hoggan, as a permittee, violated of Part 7.3 of the Permit and 40 C.F.R. § 122.41.

V. CONCLUSION

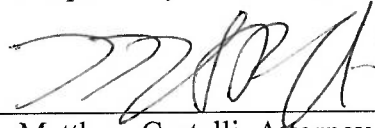
Based on the foregoing, Complainant has demonstrated no genuine issues of material fact exist, and Complainant is entitled to judgment as a matter of law on the portions of Claims I, II, and III detailed above. Therefore, Complainant requests the Presiding Officer grant Complainant’s Motion for Accelerated Decision on Liability.

²³ See Utah RSI database, accessed February 27, 2019: <https://www.utahltap.org/swppp/inspectors.php>:accessed February 27, 2019).

Respectfully submitted,

Date: March 1, 2019

By: _____



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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion for Accelerated Decision on Liability and attached Memorandum in Support in In the Matter of Kent Hoggan, Frostwood 6 LLC, and David Jacobsen, Respondents, Docket No. CWA-08-2017-0026, dated March 1, 2019, was sent this day in the following manner to the addressees listed below:

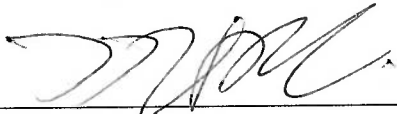
Copy by OALJ E-Filing System to:

Headquarters Hearing Clerk Mary Angeles
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Presiding Officer The Honorable Susan L. Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
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Dated: March 1, 2019